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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 203

MRS. IDA ROSSER BARBER,

Petitioner,

vs.

LEGH R. POWELL, JR., AND H. W. ANDERSON,
RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

K. R. HOYLE,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 203

MRS. IDA ROSSER BARBER,

Petitioner,

vs.

LEGH R. POWELL, JR., AND H. W. ANDERSON,
RECEIVERS OF SEABOARD AIR LINE RAILWAY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

May It Please the Court:

The Petitioner, Mrs. Ida Rosser Barber, presents her Petition for a Writ of Certiorari, and shows unto the Honorable Supreme Court of the United States:

(A.)

Summary Statement of Matters Involved.

This case as presented on this Petition for a Writ of Certiorari involves the jurisdiction of Federal Courts on removal from State Courts on alleged ground of diversity of citizenship under the applicable United States Statutes and

decisions of this Court, and the right of removal by Federal Receivers of tort actions from State Courts for the negligent operation of one of their trains by employees of the Receivers, on the ground of a diversity of citizenship between the plaintiff and the defendant Receivers as individuals, when the amount in controversy exceeds $3,000.00; as the same may be affected by 28 U. S. C. A. 125 and cognate Statutes. (Opinion of District Court and Circuit Court of Appeals, R. 2, 7).

It was stipulated in the District Court that plaintiff was at the beginning of this action and now is a resident and citizen of the State of North Carolina; and that defendants as individuals were on the date involved residents and citizens of the State of Virginia, and still are; and were on the date of the injury to Petitioner as to the operation of the train involved, operating the same as Federal Receivers of the Seaboard Air Line Railway Company appointed under an order of the United States District Court for the Eastern District of Virginia. The regularity of all matters of procedure have also been admitted by Stipulation.

The controversy and questions here presented and the matters involved as set out in this Petition arose as follows:—Petitioner brought her action in the Superior Court of Lee County, North Carolina, for damages suffered in the sum of $5,250.00 by being negligently struck and injured at a crossing by a passenger train operated by the servants of the respondents, Federal Receivers. The Clerk of Lee Superior Court overruled a motion to remove to the United States District Court for the Middle District of North Carolina, which order was reversed by the Judge of the State Court, and the record was, by the defendants in said action, who are the respondents herein, docketed in the United States District Court for the Middle District of North Carolina at Greensboro. Upon appeal by petitioner to the Supreme Court of North Carolina from the judgment in the

State Court, the judgment rendered by the Judge of Lee County Superior Court was affirmed by the Supreme Court of North Carolina. *Barber* v. *Powell et al.*, 222 N. C. 133 (R. 3).

Meanwhile, petitioner herein had filed in the United States District Court for the Middle District of North Carolina motion to remand to the State Court (*Kloeb* v. *Armour*, 311 U. S. 199). This motion was overruled and denied by the District Judge on November 24th, 1942 and petitioner objected and excepted, and exceptions thereto were preserved, settled and ordered filed pendente lite. The case was thereafter regularly calendared and trial came on for a hearing at the December, 1942 Term of the said Federal District Court; and on being reached petitioner thereupon renewed her motion to remand to State Court, which was again overruled, and petitioner again objected and excepted. Petitioner was then called to prosecute her action, and not doing so, she was called, and the action dismissed for lack of prosecution, and a final judgment was entered in the District Court dismissing her action for lack of prosecution (R. 5). *Gay* v. *Ruff*, 292 U. S. 25. The opinion of the District Court was filed November 24th, 1942 and has not yet been officially reported.

Notice of Appeal was duly given and was regularly docketed and prosecuted to the Circuit Court of Appeals for the Fourth Circuit, which on May 8th, 1943 entered and rendered a judgment and filed an opinion (not yet reported) affirming the judgment of the District Court (R. 7).

Thereupon, petitioner caused the record filed in the Circuit Court of Appeals for the Fourth Judicial Circuit, and caused the further proceedings of the Circuit Court of Appeals for the Fourth Circuit to be docketed in the United States Supreme Court and filed this Petition for the allowance of a Writ of Certiorari.

The question involved is the proper construction and ap-

plication of Section 3, Acts. 1887-8, now 28 U. S. C. A. 125, in connection with the other sections of the removal act; and whether Section 3 constitutes an exception, and was intended by Congress to constitute an exception as to Federal Receivers to the general right of removal, and the right of removal theretofore possessed by them; and whether it has been construed, or if not already so construed, whether it should be by application of recognized rules, so construed by this Court as to constitute an exception and limitation on the general rights of removal under the general removal statutes, which confers on plaintiffs in tort action for negligence by Federal Receivers servants in the operation of a train which takes precedence over and is an exception to the general right of removal theretofore assertable in cases of diversity of citizenship. (Opinions of District Court and Circuit Court of Appeals, R. 2, 7).

Neither the Supreme Court of the United States; nor has any United States Circuit Court of Appeals since 1887, (except in this case) decided differently from petitioner's contentions in passing upon and construing this Act, or contrary to the contentions now made by petitioner in regard thereto.

The above constitutes a summary statement of the case showing how matters involved arose below.

(B.)

Reasons Relied On for the Allowance of the Writ.

1. Because the District Court refused to allow the motion of petitioner to remand this case to the State Court and failed to remand this case to State Court without motion and of its own volition; and held as a matter of law that under the provisions of 28 U. S. C. A. 125 the Federal Receivers who were defendants, were entitled to remove this case to the Federal District Court on the grounds of diver-

sity of citizenship, and the District Court attempted to retain jurisdiction thereof on such removal, over the objection and exception of petitioner, who was plaintiff therein; and it dismissed the case for lack of prosecution instead of ordering a remand thereof to the State Court; and on appeal therefrom the Circuit Court of Appeals for the Fourth Judicial Circuit affirmed said order and judgment; and thus decided an important question of Federal law, and an important question as to the jurisdiction of the Federal District Courts on removal of cases from the State Courts, which according to the holdings of said judgment of the District Court and affirmed by the Circuit Court of Appeals has not been either decided or settled by the Supreme Court of the United States since the enactment in 1887 of Section 3 of the removal act, now 28 U. S. C. A. 125. This is an important question of Federal law of weight and substance and involves an important question as to the jurisdiction of United States District Courts; and should be settled by the United States Supreme Court.

2. Because the District Court held and decided, and the Circuit Court of Appeals affirmed the judgment of the District Court, holding that the question presented on this petition whether, and if so, in what way and manner and to what extent the right of Federal Receivers to affect a right of removal for a diversity of citizenship is affected by and under the provisions of the Act of 1887, now 28 U. S. C. A., which general right of removal theretofore existed where the statutory amount was involved and the diversity of citizenship existed, to remove to the District Court, was an undecided question by the United States Supreme Court, and had not been passed on by the Supreme Court of the United States since 1887. This is a question of importance to the public generally and to the profession, and involves serious questions of Federal law in regard to

the jurisdiction of United States District Courts on removals from State Courts, which are questions which should be decided by the United States Supreme Court.

3. Because the District Court held and decided as a matter of law that the provisions of 28 U. S. C. A. 125, when construed in accordance with the applicable rules of statutory construction approved by the United States Supreme Court did not deny to Federal Receivers the right of removal of this case to the District Court on the ground of diversity of citizenship; and that the general purpose of the portion of the removal act and amendments thereto which is now 28 U. S. C. A. 125, when considered and construed in its connection with and in relation to the other portions of said act, was not to deny to Federal Receivers a right of removal of tort actions for the negligence of their employees on such ground of diversity of citizenship; and that the case of *Gableman* v. *Peoria, etc., Ry.*, 179 U. S. 335, 339, does not decide nor do other applicable cases, such as *Eddy* v. *Lafayette*, 163 U. S. 456; *Texas, etc. Ry.* v. *Johnson*, 151 U. S. 81, 102-3, so hold or decide; and the Circuit Court of Appeals affirmed such judgment of the District Court; thus deciding an important question of Federal law, and an important question as to the jurisdiction of Federal District Courts on removals from State Courts for a diversity of citizenship in a way probably in conflict with the foregoing, and of other applicable decisions of the United States Supreme Court.

4. Because the District Court below, and the Circuit Court of Appeals for the Fourth Judicial Circuit both failed to appy to the construction of Section 3, Act 1887, now 28 U. S. C. A. 125, and to give application as authorities in point and to apply the decisions set out in Paragraph 3 next preceding; or to apply the principle as laid down by the

United States Supreme Court in *Chicago, etc. R. R.* v. *U. S.*, 220 U. S. 559, 571-7, (construing *R. R.* v. *Taylor*, 210 U. S. 281, 294-6); *Greene* v. *Louisville, etc. Co.*, 244 U. S. 499, 519-21; *Hopkins* v. *Tel. Co.* 275 U. S. 393, headnote 2 and pp. 398-9; *Smiley* v. *Kansas*, 196 U. S. 447, 455; and *Steimetz* v. *Allen*, 192 U. S. 543, 560, and many other cases of like import as to the effect of a long continued acquiesce by Congress for more than forty years in the general construction of such Statute by this Court as set out in *Gableman* v. *Peoria, etc. Ry.*, 179 U. S. 135, 139, and of the other cases in paragraph 3 next preceding; that thereby such long continued acquiescence made the same the binding general construction of said Act; and the District Court and Circuit Court of Appeals thereby decided an important question of Federal law, and an important question as to the jurisdiction of Federal Courts, in a way probably in conflict with the principles of all the foregoing applicaple, and other applicable decisions in the United States Supreme Court, which should have been applied to the effect that such long acceptance and acquiescence by Congress in such a general construction by this Court of an act does make such construction binding on the Courts.

5. Because the Circuit Court of Appeals below held and decided (a) the only and sole effect of Section 3 of the act of 1887, now 28 U. S. C. A. 125 was to make Federal Receivers amenable to suit without permission of the appointing Court; (b) and that "the general principles and what might be called the fundamental philosophy of the Federal removal Statutes ". . . clearly justify the right of the Receivers to remove the instant case"; and failed to follow or apply the applicable decisions, or by the application of the proper and accepted rules of statutory construction to determine the plain intent and meaning of 28 U. S. C. A. 125 as a statutory exception to and limitation by

special legislation modifying a general right, and legislation modifying the prior general rights of Federal Receivers; and thus the District Court and the Circuit Court of Appeals below each decided an important question of Federal law, and an important question as to the jurisdiction of Federal District Courts on removals from State Courts for a diversity of citizenship in a way probably in conflict with all of the foregoing applicable, and other applicable decisions of the United States Supreme Court set out in No. 4 next preceding; and probably contrary to the decisions of the United States Supreme Court in all of the cases named in No. 3 above that the purpose of the legislation to reduce the volume of Federal litigations and is also held in *Fisk* v. *Henarie*, 142 U. S. 459, 467-8; *Tenn.* v. *Union, etc. Bank*, 152 U. S.; *In Re: Pennsylvania Co.*, 137 U. S. 451, 454; *Smith* v. *Lyon*, 133 U. S. 315, 319-20; *Gay* v. *Ruff*, 292 U. S. 25, and *Gableman* v. *Peoria, etc. Ry.*, 179 U. S. 135 and many other cases; this being a matter of substance, weight and importance to the Courts, litigants, the legal profession and the public generally.

6. Because of the general importance to the Courts, litigants and the public and the legal profession of the matters and questions involved in Secs. 1, 2, 3, 4 and 5 next preceding; and because of the contrariety of views which had developed concerning them.

7. Because the Circuit Court of Appeals for the Fourth Judicial Circuit in the matters set out in Paragraphs 1, 2, 3, 4 and 5 preceding and the matters therein involved and in the manner as therein set out has so far departed from the accepted and usual course of judicial proceedings, and has so far sanctioned such a departure by the District Court below in such matters of legal proceedings, which are of such weight, substance and importance as to call for

the exercise of the Supreme Court's power of supervision and correction thereof.

Wherefore, your petitioner, Mrs. Ida Rosser Barber, respectfully prays the Honorable Supreme Court of the United States that a Writ of Certiorari issue out of and under the seal of this Honorable Court to the Circuit Court of Appeals for the Fourth Judicial Circuit, commanding such Court to certify and send to this Court for review and determination of a day certain to be named therein, a full and complete transcript of the record and all proceedings in the case as above numbered and entitled on the docket of said Court, No. 5058, *Mrs. Ida Rosser Barber, appellant* v. *Legh R. Powell, Jr., and H. W. Anderson, Receivers of Seaboard Air Line Railway Company, appellees;* and that the judgment of the Circuit Court of Appeals for the Fourth Judicial Circuit affirming the judgment of the United States District Court for the Middle District of North Carolina, may by this Honorable Court be here reversed and set aside; and that your petitioner be granted such other and further relief in the premises as to this Court may seem just and proper under the circumstances; and your petitioner will ever pray.

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